

Entered on Docket
December 2, 2024EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

The following constitutes the order of the Court.
Signed: December 2, 2024

M. Elaine Hammond
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re

JOHN JEFFERSON VITALICH,

Debtor.

) Case No. 24-51018 MEH

) Chapter 11

ORDER DENYING EX PARTE APPLICATION FOR TRO

Plaintiff and Debtor John Jefferson Vitalich filed a Chapter 7 bankruptcy case on July 1, 2024, the day prior to a scheduled trustee's sale. On November 8, 2024, this case was converted to one under Chapter 11.

Vitalich's Bankruptcy Case

At the outset of a Chapter 7 bankruptcy case, individual debtors are required to complete a Summary of Assets and Liabilities, Statement of Financial Affairs (SOFA), and Schedules A-J. These documents identify assets, liabilities, exempt property, and secured and unsecured assets, in addition to other information.

Vitalich stated in the statement of intent that he intended to sell or refinance the real property in the bankruptcy case.

Secured Creditor, 1Sharpe Holdings, LLC ("1Sharpe"), filed a motion for relief from stay pursuant to **11 U.S.C. §362(d)(1)**, for cause, including the lack of adequate protection of

1 an interest in property of a party interest. The stay relief motion came on for hearing on
2 September 12, 2024.

3 Vitalich participated in the hearing where I explained there were no grounds to deny
4 the request for stay relief as Vitalich was not proposing to make adequate protection payments
5 to 1Sharpe and no evidence was presented that Vitalich had equity in the property.

6 At the hearing, 1Sharpe proposed an accommodation to Vitalich whereby the court
7 would grant relief from stay, provided that no non-judicial foreclosure sale would occur prior
8 to November 15, 2024. This provided Vitalich with approximately 60 days to either sell the
9 real property or refinance the debt owed to 1Sharpe. There would be no stay as of November
10 15, 2024, and 1Sharpe would be allowed to proceed with the foreclosure. It was discussed at
11 the hearing that if Vitalich was unable to sell the property or refinance the senior debt a
12 foreclosure sale would then occur shortly thereafter.

13 **Referral of Bankruptcy Case**

14 On November 14, 2024, Vitalich filed a Complaint and Emergency *Ex Parte*
15 Application for a Temporary Restraining Order (“TRO Application”) in the District Court for
16 the Northern District of California. The TRO Application did not reference a prior
17 Bankruptcy Court Order granting relief from stay as of November 15, 2024, nor the on-going
18 proceedings in Vitalich’s bankruptcy case.

19 Upon review of the pleadings and pursuant to General Order No. 24 (1.01), District
20 Judge Haywood S. Gilliam referred the TRO Application to Bankruptcy Judge M. Elaine
21 Hammond as the Bankruptcy Court has issued several orders in this case. Judge Gilliam
22 entered a briefing schedule (Dkt. #15) prior to the referral of the District Court case to the
23 Bankruptcy Court. The matter has been fully briefed. Therefore, the TRO Application will
24 not be treated as an *ex parte* matter. Further, I find the TRO appropriate for resolution on the
25 pleadings.

Legal Standard

In order to obtain a TRO, a movant must establish four factors:

- (1) A likelihood of success on the merits,
- (2) A risk of irreparable harm absent injunctive relief,
- (3) That the balance of equities tips in favor of injunctive relief, and
- (4) That injunctive relief is in the public interest.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 28 (2008).

Additionally, the Ninth Circuit employs a “serious questions” test whereby a movant seeking a stay “must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the [movant’s] favor.” *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011).

The Plaintiff bears the burden of proof on each of these factors. Each factor is applied below.

(1) Vitalich is not likely to succeed on the merits

In Vitalich’s Complaint, he asserts five grounds for relief:

- (1) Violation of Civil Code § 1671,
- (2) Violation of Fair Debt Collection Practices (“FDCPA”),
- (3) Violation of Civil Code § 1788.13,
- (4) Violation of Cal. Civ. Code § 1788.13, and
- (5) Violation of Business and Professional Code § 17200 *et seq.*

Vitalich is highly unlikely to succeed on the merits on the claims he seeks to pursue. As required at the outset of the Bankruptcy Case, Vitalich completed Official Form 106 A/B, identifying assets that are property of the estate upon the filing of the bankruptcy petition.

Vitalich’s response to two of the questions on Schedule A/B are applicable to the request for TRO:

“33. Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment. *Examples include rights to sue.*” Vitalich checked the box indicating that he did NOT have any claims against third parties.

1 **“34. Other contingent and unliquidated claims of every nature, including**
2 **counterclaims of the debtor and rights to set off claims.”** Again, Vitalich checked the box
3 indicating that he did NOT have other contingent and liquidated claims.

4 These responses were signed by Vitalich under penalty of perjury on July 24, 2024.
5 As such, Vitalich disavowed at the outset of his bankruptcy case claims he expressly seeks to
6 assert now.

7 **(2) Vitalich has not established a risk of irreparable harm absent injunctive relief**

8 1 Sharpe is the Note holder and beneficiary of the Deed of Trust that is the subject of
9 this action. The loan was a short-term loan that matured on October 1, 2022. No payments
10 have been made since August 2022.

11 Vitalich asserted in the statement of interest he provided in the bankruptcy case that
12 his intention was to sell or refinance the real property during his bankruptcy case. Vitalich’s
13 willingness to sell the property establishes that a claim for damages would provide sufficient
14 relief.

15 Under California law, a party does not suffer “irreparable harm” when that harm
16 simply results from the express terms of [the] contract.” *Epic Games, Inc. v. Apple Inc.*, 493
17 F. Supp. 3d 817, 845 (N.D. Cal. 2020). Accordingly, Vitalich has not established irreparable
18 harm.

19 **(3) The balance of equities weighs against injunctive relief**

20 The TRO Application did not reference the Bankruptcy Court Order granting relief
21 from stay as of November 15, 2024, nor the on-going proceedings in Vitalich’s bankruptcy
22 case.

23 Instead of filing a complaint and TRO before the District Court, Vitalich should have
24 filed an adversary proceeding, complaint, and TRO within Vitalich’s bankruptcy case.
25 During six months in the bankruptcy case, Debtor did not assert the claims now pled while
26 before the bankruptcy court.

1 This leads to a concern that Vitalich engaged in forum shopping in an attempt to avoid
2 the bankruptcy court order authorizing a foreclosure sale to go forward as of November 15,
3 2024. As such, the balance of equities weighs against Vitalich's request for a TRO.

4 **(4) Injunctive relief is not in the public interest**

5 The public interest weighs in favor of denying the TRO "when there demonstrably is
6 no valid basis under the Bankruptcy Code to continue staying [the creditor's] right to proceed
7 with a foreclosure sale." *In re Farwell*, No. 14-10126, 2015 WL 9438479, *5 (Bankr. D. Md.
8 2015).

9 Vitalich has not made a payment since August 1, 2022. Denying the TRO would
10 allow 1Sharpe to exercise its legitimate rights under bankruptcy law and would return the
11 property at issue to productive use.

12 **(5) Vitalich has not made a showing of "serious questions"**

13 Finally, there are no "serious questions" in this case because (a) there is not a strong
14 likelihood of success on the merits and public interest weighs heavily against a stay, and (b)
15 there is not a substantial case on the merits and the balance of hardship's does not tip sharply
16 in Vitalich's favor.

17 Here, the Bankruptcy Court has already granted 1Sharpe's motion for relief from stay
18 on September 25, 2024. Rather than filing a complaint and TRO before the District Court,
19 Vitalich should have filed a filed a complaint in an adversary proceeding within the
20 bankruptcy case Vitalich filed six months ago.

21 For the reasons stated, Vitalich's request for a TRO is DENIED, and consistent with
22 the order in the bankruptcy case, the foreclosure sale may proceed without further delay.
23 IT IS SO ORDERED.

24 **END OF ORDER**
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27
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COURT SERVICE LIST

John Jefferson Vitalich
601 Belavida Road
Monterey, CA 93940

Via ECF:

All ECF Recipients

UNITED STATES BANKRUPTCY COURT
for the Northern District of California

Notice Recipients

District/Off: 0971-5

User: admin

Date Created: 12/2/2024

Case: 24-51018

Form ID: pdfeoc

Total: 1

Recipients submitted to the BNC (Bankruptcy Noticing Center):

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TOTAL: 1